

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17504-A of JMM Corporation, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decisions of Administrative Law Judges, Department of Consumer and Regulatory Affairs (“DCRA”), sustaining two notices of civil infraction for operating in derogation of Certificate of Occupancy B176169 and revoking the aforementioned Certificate of Occupancy as well as a Mechanical Amusement License. The subject property is located in the DD/C-2-C District at premise 919 5th Street, N.W. (Square 516, Lot 825).

HEARING DATES: July 25, 2006, December 5, 2006, February 20, 2007
DECISION DATE: March 6, 2007

DATE OF DECISION
ON EMERGENCY
MOTION TO STAY: October 23, 2007

ORDER DENYING EMERGENCY MOTION TO STAY ORDER

On October 9, 2007, Appellant JMM Corporation (“JMM” or “movant”) filed an Emergency Motion for a Stay (“Motion”) of the Board of Zoning Adjustment (“Board” or “BZA”) Order issued on October 1, 2007 in BZA Appeal No. 17504 (“Order”). JMM seeks to stay the Order while its petition to review the decision is pending before the District of Columbia Court of Appeals.

The Order upheld the revocations of JMM’s Certificate of Occupancy (“C of O”) No. B176169 and Mechanical Amusement License No. 31005263. The revocations, and the Board’s Order sustaining those actions, were principally based upon a finding that JMM’s retail establishment – Fun Fair Video – was a sexually-oriented business establishment (“SOBE”), as that term is defined in the Zoning Regulations, at 11 DCMR § 199.1. Following the issuance of the Order, the Office of the Attorney General sought and was granted a Temporary Restraining Order by the D.C. Superior Court temporarily closing Fun Fair Video.

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO.

17504-A

EXHIBIT NO.

49

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In order for JMM to prevail on its motion it must make four showings: (1) likelihood of success on the merits of its petition for review, (2) irreparable injury resulting from denial of the stay, (3) no harm to opposing parties if a stay is granted, and (4) the public interest favors the granting of the stay. *Barry v. Washington Post Co.*, 529 A.2d 319, 320-321 (D.C. 1978).

The Board notes at the outset that, the Court of Appeals has already denied a virtually identical motion on October 12, 2007. Appellant provides no reason why this Board should find contrary to that decision. In fact, Appellant argues as its “fundamental grounds” for a stay that “[t]he Constitution does not permit the unbridled discretion in administrative agencies to stop the operations of adult entertainment businesses. That is the proper function of the courts.” Appellant’s Emergency Motion to Stay BZA’s Final Order at 4. Accordingly, both the D.C. Court of Appeals in denying the stay and the D.C. Superior Court in ordering temporary closure of the business, have exercised that function. This Board defers to the Court of Appeal’s ruling that Appellant has not made the required showing and concurs with the Court’s conclusion based on the evidence in the record.

This Board does not have jurisdiction over the Constitutional claims upon which Appellant bases its argument for likelihood of success on the merits. Those claims are within the expertise of the Court of Appeals. Accordingly, this Board defers to the Court’s judgment in denial of the stay on that ground. Appellant’s allegation of permanent financial harm from closure of its business is outweighed by the harm to the surrounding community and the party in this case, ANC 6A, that would ensue from continued operations of an unlawful business found to be compromising public decency. For the same reasons, granting the stay would be contrary to the public interest.

For the reasons stated above, the Board concludes that JMM has not met its burden of demonstrating that it is entitled to a stay of this Board’s Order in Appeal No. 17504. Accordingly, JMM’s Emergency Motion to Stay the BZA’s Final Order, filed on October 9, 2007, is **ORDERED DENIED**.

VOTE: **3-0-2** (Ruthanne G. Miller, Curtis L. Etherly, Jr., and Marc D. Loud to deny; no fourth member and no Zoning Commission member participating or voting.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member approved the issuance of this order.

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ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: **JAN 29 2008**

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.